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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

CHARLES ELMORE GRIFFIN  
CLERK

No. 81

LIDE THOMPSON, MATTIE THOMPSON, MARY  
TUKES, VERA THOMPSON, JIM THOMPSON,  
ALINE UTSEY, RILLA McINTYRE and RUTH Mc-  
INTYRE

*Petitioners*

vs.

LUTHER THOMPSON, and H. T. PATTON, Executor of  
the Estate of Dr. S. A. Thompson, Deceased

*Respondents*

RESPONDENTS' BRIEF ON PETITION FOR WRIT  
OF CERTIORARI TO THE SUPREME COURT  
OF ARKANSAS

*W* J. BRUCE STREETT,  
✓ J. E. GAUGHAN,

Counsel for Respondents



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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**No. 853**

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*Petitioners*

*vs.*

LUTHER THOMPSON, and H. T. PATTON, Executor of  
the Estate of Dr. S. A. Thompson, Deceased

*Respondents*

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**BRIEF IN RESPONSE TO PETITION FOR WRIT OF  
CERTIORARI**

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**I.**

**THE PETITION FOR WRIT OF CERTIORARI  
SHOULD BE DENIED**

1. The right to review by certiorari does not exist under Section 344, Title 28 USCA (237 Judicial Code, as amended) Paragraph (b), because there was no denial of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. The Statutes of Arkansas which governed the pro-

cedure in the Probate Court under which the lands were sold afforded the petitioners full opportunity to be heard and to present their objections to the order of sale, and to appeal if error was committed by the court in making the order.

3. The Statutes of Arkansas afford to petitioners adequate means to have the judgment of the probate court vacated on proper grounds, and petitioners did avail themselves of this procedure; but the State Court held that the grounds for vacating the judgment offered by petitioners were insufficient.

4. In addition to the remedy pursued by petitioners they had a remedy by equitable proceedings in the Chancery Court to set aside the administrator's deed on the ground of fraud.

## II.

### STATE STATUTES INVOLVED

(References are to Pope's Digest of the Statutes of Arkansas.)

#### A. STATUTES PERTAINING TO SALE OF LANDS TO PAY DEBTS

Section 148 Lands are assets in the hands of the Administrator for the payment of debts of the intestate.

Section 149 Provides how application shall be made to the Probate Court for an order to sell lands to pay debts.

Section 151 Relates to the order of sale to be entered by the Court directing the sale.

Section 158 Lands must be appraised.

Section 161 Lands must bring two-thirds of appraised value.

Section 157 Notice of the proposed application for an order to sell must be published in a newspaper.

## B. STATUTES SPECIFYING JURISDICTION OF PROBATE COURTS

Section 2883 Probate Courts have original jurisdiction in matters pertaining to the Estates of deceased persons.

Section 2884 Constitutional Provision. Appeals may be taken from judgments and orders of the probate court to the Circuit Court under such regulations and restrictions as may be prescribed by law. Art. VII, Sec. 35, Const.

Section 2885 Provides the manner in which appeals should be taken to the Circuit Court from orders of the Probate Court — and to the Supreme Court from judgments of the Circuit Court. Any heir, devisee or legatee may appeal.

By Act 3 of the General Assembly of Arkansas for the year 1939, the presiding Chancery Judge was made Judge of the Probate Court instead of the County Judge who had theretofore presided as such judge. By Acts 164 of 1939 and 214 of 1939, provisions were made for appeals from the Probate Court direct to the Supreme Court.

### C. STATUTES WHICH AFFORD REMEDY FOR MODIFYING OR VACATING A JUDGMENT

Section 8246. "The Court in which a judgment or final order has been rendered or made, shall have power after the expiration of the term to vacate or modify such judgment or order;"

Eight grounds are listed including:

"Fourth—For fraud practiced by the successful party in the obtaining of the judgment or order."\*

Section 8248. "Procedure to vacate or modify. The proceedings to vacate or modify the judgment or order on the grounds mentioned in the fourth, fifth, sixth, seventh and eighth subdivisions of Section 8246 shall be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On the complaint, a summons shall issue and be served, and other proceedings had as in an action by proceedings at law. Id Sec. 573."

Section 8249. "Conditions of relief. A judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified all liens

\*This has been held to mean fraud practiced on the court. PARKER v. SIMS, 185 ARK., 1111; MANNING v. MANNING, EXECUTOR, 206 ARK., 425.



and securities obtained under it shall be preserved to the modified judgment. Id Sec. 574."

Section 8250. "Preliminary Proof. The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action. Id. Sec. 575."

### III.

#### STATEMENT OF THE CASE

The first complaint was filed on July 21st, 1941. (R. 5) A motion to quash service was filed by the defendants (respondents herein) which was denied. Various orders were entered and settings of the case transpired culminating in a motion to dismiss (R. 13) which was filed by defendant, S. A. Thompson on April 5th, 1946. In passing upon this motion, the court reviewed the entire record of the former proceedings of the court relating to the order of sale which the court had made in 1936. In passing upon the motion to dismiss, the court made written findings, (R. 18) holding that the allegations in the complaint did not set out sufficient facts to show that fraud had been practiced on the court in the procurement of the order of sale, and that the record showed that the proceeding in the probate court relating to the sale appeared to be regular and that plaintiffs were guilty of laches in waiting nearly five years to present their petition to vacate the order of sale. The motion to dismiss was sustained November 23rd, 1946.

On December 5th, 1946, the Court made an order allowing plaintiffs to file amendments to their original plead-

ing. (R. 25) They filed an amended and substituted complaint (R. 25) in response to which defendant renewed his motion to dismiss (R. 31), which motion was sustained and the amended and substituted complaint was dismissed on the same grounds and for the same reasons as the original complaint. (R. 32) From this order the plaintiffs appealed to the Supreme Court of Arkansas, which Court affirmed the order of the lower court. (R. 52).

#### IV.

#### ARGUMENT

The object of petitioners' complaint filed in the probate court was to vacate a judgment of that court which had been made nearly five years before. In Arkansas, the Probate Court is a court of superior jurisdiction having regular terms. *Sewell v. Reed*, 71.SW (2d) 191; 189 Ark., 50; *Branch v. Veterans Administration*, 74 SW (2d) 80, 189 Ark. 662; *Levinson v. Treadway*, 78 SW (2d) 59; 190 Ark. 201; *Young v. Young*, 147 SW (2d) 736; 201 Ark. 984; *Bright v. Johnson*, 152 SW (2d) 540; 202 Ark. 751; *Gocio v. Seamster*, 160 SW (2d) 194, 203 Ark. 937.

After the lapse of the term the court cannot vacate a judgment except pursuant to statutory provisions, one of which is for fraud practiced on the court. *Parker v Sims*, 185 Ark. 1111; 175 SW (2d) 982; *Manning v. Manning, Executor*, 206 Ark. 425.

While the complaint did not strictly meet the statutory requirements, the court treated it as being sufficient and considered it as though it fully met these requirements. In passing upon the sufficiency of the complaint the court re-examined the record of the proceedings by which the lands were sold and the court considered the allegation of fraud set forth in the complaint. From a consideration of all this the court reached the conclusion that the elements of fraud charged in the complaint, if true, considered in connection with the record of the proceedings in the probate court, were not sufficient to justify the court in vacating the decree. The Petitioners were permitted by the court to file an amended and substituted complaint, which the court likewise dismissed in response to defendant's demurrer.

The action in the Probate Court to vacate the former judgment of that court was not the only remedy that petitioners might have pursued. They might have maintained an action in the Chancery Court based on grounds of fraud. The Chancery Court has jurisdiction to cancel a deed given by the Administrator on the ground of fraud. *Crider v. Simmons*, 192 Ark. 1075; *Wilson v. Lester*, 182 Ark., 386.

The remedies pursued by petitioners provided under the statutes of the State and in the courts of the State of Arkansas, afforded them due process of law.

The cases cited by petitioners to support their contention that they have been denied due process of law are not in point and do not fit the facts in this case.

In cases of this kind due process of law requires that a person shall be afforded an opportunity under the laws of the State to protect his property or to assert his rights. This opportunity was available to petitioners.

In the following cases it was held that the procedure authorized by the laws of the State constituted due process.

*Miedreich v. Lauenstein*, 232 U. S. 236; 58 U. S. L ed 584; *American Surety Co. v. Baldwin*, 287 U. S. 156; 77 U. S. L ed 231; 86 A.L.R. 298; *Joseph Paterno v. John A. Lyons, Commissioner*, U. S. Sup. Ct. Fed. Advance Sheet, Vol. 92, No. 17, Page 1035; *Gelfert v. National City Bank of New York*, 313 U. S. 221; 85 U. S. L ed 1299; 133 A. L. R. 1467. *Stadelman v. Miner*, 246 U. S. 544; 62 U. S. L ed 875.

The contention that the probate court passed on the merits of the case at the same time holding that it was without jurisdiction is a specious argument. The court never held that it was without jurisdiction of the subject matter, but held that it was without jurisdiction to set aside its former judgment on the showing made by the petitioners in the pleadings which they filed.

Respectfully submitted,

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